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Nos. PD-0038-21 & PD-0039-21

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COURT OF CRIMINAL APPEALS
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In the Court of Criminal Appeals of Texas

JOHNNY JOE AVALOS,
Appellant
v.
THE STATE OF TEXAS,
Appellee

State's Brief on the Merits
from the
Fourth Court of Appeals, San Antonio, Texas
Nos. 04-19-00192-CR & 04-19-00193-CR
Appeal from Bexar County

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IDENTITY OF TRIAL JUDGE, PARTIES, AND COUNSEL

The trial judge below was the Honorable **Lori Valenzuela**, Presiding Judge of the 437th Judicial District Court, Bexar County, Texas.

The parties to this case are as follows:

1) **Johnny Joe Avalos** was the defendant in the trial court and appellant in the court of appeals.

2) **The State of Texas**, by and through the Bexar County District Attorney's Office, prosecuted the charges in the trial court, was appellee in the Court of Appeals, and is the petitioner to this Honorable Court.

The trial attorneys were as follows:

1) Johnny Joe Avalos was represented by **Jorge Aristotelidis**, 310 S. Saint Mary's Street, Ste. 1910, San Antonio, Texas 78205.

2) The State of Texas was represented by **Joe D. Gonzales**, District Attorney, and **David Lunan**, Assistant District Attorney, Paul Elizondo Tower, 101 W. Nueva Street, San Antonio, TX 78205.

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STATEMENT OF THE CASE

Appellant pled guilty to two counts of capital murder. (192-CR 4; 193-CR 5; RR5 11-12.)[1] The trial court accepted his pleas and sentenced him to life without parole, which was mandatory under § 12.31(a)(2) of the Penal Code. (192-CR 25-26; 193-CR 285-86; RR5 12-14.) After a panel of the court of appeals heard oral arguments, it granted the parties' joint motion to abate for a finding of whether appellant was intellectually disabled, and the trial court subsequently found he was so. (192-CR Supp. 4-5; 193-CR Supp. 4-5.)

On June 3, 2020, the court of appeals panel affirmed the trial court's sentence, and its opinion is attached as an appendix to the en banc dissent. *Avalos v. State*, 616 S.W.3d 207, 214-19 (Tex. App.—San Antonio, pet. granted) (app. to en banc dissenting op.) (Chapa, J., dissenting). Appellant filed a motion for en banc reconsideration, which was granted. On December 30, 2020, the en banc court withdrew the panel opinion and judgment, reversed the trial court's sentence, and remanded for further proceedings. *Avalos v. State*, 616 S.W.3d 207 (Tex. App.—San Antonio, pet. granted) (op. on en banc reconsideration).

[1] The Reporter's Record of February 19, 2019, will be referenced as "RR5," followed by its respective page numbers. The Clerk's Records in appellate cause numbers 04-19-00192-CR & 04-19-00193-CR will be referenced as "192-CR" and "193-CR," respectively, and their supplements as "192-CR Supp." and "193-CR Supp.," respectively, followed by their page numbers.

ISSUES PRESENTED

1. Are mandatory life-without-parole sentences cruel and unusual as applied to intellectually disabled offenders?

    A. The Supreme Court has held that mandatory life without parole is not cruel and unusual, and, since then, it has only exempted juveniles from that general holding. Appellant is an adult, not a juvenile. Thus, did the court of appeals err when it disregarded binding precedent?

    B. The Supreme Court's exemption of juveniles from mandatory life without parole was based on several material differences between juveniles and adults. Having an intellectual disability has no bearing on those differences. Thus, did the court of appeals erroneously analogize intellectually disabled adults to juveniles?

    C. Do other considerations—e.g., no evidence of a national consensus supporting appellant's position—also warrant reversal?

2. If the opinion below is affirmed, what are the available punishment options?

STATEMENT OF FACTS

Appellant murdered four women and one child, resulting in guilty pleas to two counts of capital murder. (192-CR 4; 193-CR 5; RR5 11-12.) The underlying facts of those murders have no bearing on the issues before this Court, thus this brief will not belabor the Court with an in-depth recitation of them. However, documents outlining both crimes can be found in the Clerk's Records. (192-CR 94-267; 193-CR 147-254.) Relevant here, the trial court found that appellant is intellectually disabled (192-CR Supp. 4-5; 193-CR Supp. 4-5), a fact not disputed by the State. Appellant never challenged his underlying convictions on appeal, but, as explained above, the court of appeals reversed his sentences of life without parole and remanded for a new punishment hearing.

SUMMARY OF THE ARGUMENT

Issue 1: Supreme Court holdings must be followed until they are overruled or abrogated by the Court itself. Here, *Hamelin v. Michigan* controls because it held mandatory life without parole is not cruel and unusual, and the Supreme Court has only deviated from that holding in the context of juveniles, not intellectually disabled offenders.

Moreover, the Supreme Court has emphasized that juveniles are fundamentally different from adults because of their transient immaturity. Intellectual disability, on the other hand, is a fixed trait; thus, for such offenders, the penological rationales underlying mandatory life without parole justify that sentence.

Further, neither appellant nor the court of appeals outlined a changing national consensus against mandatory life without parole for intellectually disabled offenders; the holding below will have ripple effects that threaten to undermine long-settled cases; and alternative reprieves remain available to the intellectually disabled, undercutting the need for an inflexible constitutional rule.

Issue 2: If the intellectually disabled are analogous to juveniles, then both the Supreme Court and this Court have indicated that, following an individualized sentencing hearing, the only appropriate punishments are life with parole eligibility or life without parole.

ARGUMENT

I. Mandatory life without parole is not unconstitutional as applied to intellectually disabled offenders.

Below, appellant argued that § 12.31(a)(2) of the Penal Code is unconstitutional as applied to him, an intellectually disabled person, under both the federal and state constitutions because it mandates life without parole.[2] The en banc court of appeals agreed, reversed his sentence, and remanded for an individualized sentencing hearing. In doing so, it erred.

a. As-applied challenges and standard of review

"A defendant raising only an 'as applied' challenge concedes the general constitutionality of the statute but asserts it is unconstitutional as applied to her particular facts and circumstances." *Modarresi v. State*, 488 S.W.3d 455, 465 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (citing *State ex rel. Lykos*, 330 S.W.3d 904, 910 (Tex. Crim. App. 2011)). "A defendant challenging the constitutionality of a statute bears the burden to establish its unconstitutionality." *Id*. (citing *Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002)). The constitutionality of a criminal statute is a question of law, which is reviewed *de novo*. *Id.*

[2] Appellant originally suggested that the state constitution should be read more expansively than the federal. However, the court of appeals rejected that argument and considered both issues in tandem because there is "no significance in the difference between the Eighth Amendment's 'cruel and unusual' phrasing and the 'cruel *or* unusual' phrasing of Art. I, Sec. 13 of the Texas Constitution." *Cantu v. State*, 939 S.W.2d 627, 645 (Tex. Crim. App. 1997). Thus, this brief also addresses the issues together.

b. Applicable law

When the State does not seek the death penalty, an individual adjudged guilty of a capital felony shall be imprisoned for life without parole if he committed the offense when 18 years of age or older. Tex. Penal Code Ann. § 12.31(a)(2); *see also* Tex. Crim. Proc. Ann. art. 37.071, § 1 ("If a defendant is found guilty in a capital felony case in which the state does not seek the death penalty, the judge shall sentence the defendant to life imprisonment or to life imprisonment without parole as required by Section 12.31, Penal Code.").

c. This case is controlled by Harmelin v. Michigan

Appellant never argued that intellectually disabled defendants cannot receive life without parole. In other words, he did not make an *Atkins*-like claim attacking life-without-parole sentences for intellectually disabled defendants in all instances. *Atkins v. Virginia*, 536 U.S. 304 (2002) (categorically baring the death penalty for intellectually disabled offenders). Rather, his argument was that *mandatory* life without parole is cruel and unusual if the offender is intellectually disabled. As a result, this case is controlled by *Harmelin v. Michigan*, 501 U.S. 957 (1991), in which the Supreme Court declared that the mandatory imposition of life without parole is not cruel and unusual. As explained more below, it has only deviated from that rule for juvenile defendants. For all other offenders, *Harmelin*'s general holding controls.

1. *Harmelin*'s holding

Ronald Harmelin "was convicted of possessing 672 grams of cocaine and sentenced to a mandatory term of life in prison without possibility of parole." *Harmelin v. Michigan*, 501 U.S. 957, 961 (1991). Harmelin made two distinct attacks on his sentence. First, that his life-without-parole sentence was cruel and unusual because it was "significantly disproportionate" to the crime he committed. *Id*. His proportionality argument was rejected by the Court, but its reasoning was fractured. *Compare id*. at 962-94 (opinion of Scalia, J.) *with id*. at 996-1005 (opinion of Kennedy, J.).

He next argued that imposing life without parole absent an individualized sentencing hearing was cruel and unusual. *Id*. at 961-62. In other words, Harmelin's second argument attacked the mandatory imposition of life without parole—it was not based on a theory that his sentence was disproportionate. *Id*. at 994 ("Petitioner claims that his sentence violates the Eighth Amendment for a reason *in addition to its alleged disproportionality*." (emphasis added)). And, unlike his proportionality argument, rejection of his second argument garnered a majority of the Court. *Id*. at 961, 994-96 (Scalia, J., "delivered *the opinion of the Court* with respect to Part IV" (emphasis added)); *id*. at 996 (Kennedy, J., concurring with Part IV). Thus, Part IV of *Harmelin* constitutes binding authority.

In rejecting Harmelin's second issue, the Court stated, "Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history." *Id*. at 994-95. "There can be no serious contention, then, that a sentence which is not otherwise cruel and unusual becomes so simply because it is 'mandatory.'" *Id*. at 995. The Court then rebuffed Harmelin's attempt to extend the Court's "individualized capital-sentencing doctrine" to life-without-parole sentences "because of the qualitative difference between death and all other penalties." *Id*. Thus, the Court concluded, "We have drawn the line of required individualized sentencing at capital cases,[3] and see no basis for extending it further." *Id*. at 996.

In his concurring opinion, Justice Kennedy further expounded on the majority's holding. *Harmelin*, 501 U.S. at 1006-08 (Kennedy, J., concurring). He noted, "It is beyond question that the legislature 'has the power to define criminal punishments without giving the courts any sentencing discretion' . . . ." *Id*. at 1006 (quoting *Chapman v. United States*, 500 U.S. 453, 467 (1991)). He continued, "To set aside petitioner's mandatory sentence would require rejection not of the judgment of a single jurist, . . . but rather the collective wisdom of the Michigan Legislature and, as a consequence, the Michigan citizenry." *Id*. He concluded,

[3] This is a capital-murder case, but it is clear from the context of the *Harmelin* opinion that references to "capital cases" mean those in which the death penalty was imposed, not non-death capital cases. *See Capital Offense*, Black's Law Dictionary (11th ed. 2019) ("A crime for which the death penalty may be imposed.").

"We have never invalidated a penalty mandated by a legislature based only on the length of sentence, and . . . we should do so only in the most extreme circumstance." *Id*. at 1006-07.

Simply, "under *Harmelin*, the Eighth Amendment does not afford a defendant who was an adult at the time of the offense the right to produce evidence of mitigating circumstances when the state seeks a life sentence without parole." *Modarresi v. State*, 488 S.W.3d 455, 466 (Tex. App.—Houston [14th Dist.] Houston 2016, no pet.). The *Harmelin* Court "made no exceptions . . . ." *Id*.

2. The court of appeals's rejection of *Harmelin*

The court of appeals rejected the State's reliance on *Harmelin*. With no substantive analysis, it stated, "*Harmelin* does not control because it 'had nothing to do with [intellectually disabled persons].'" *Avalos v. State*, 616 S.W.3d 207, 210 n.2 (Tex. App.—San Antonio, pet. granted) (op. on en banc reconsideration) (paraphrasing *Miller v. Alabama*, 567 U.S. 460, 481 (2012)).[4]

[4] The original panel opinion, while ultimately affirming the trial court, also rejected the State's reliance on *Harmelin*. *Avalos*, 616 S.W.3d at 218 (app. to en banc dissenting op.). But, unlike the en banc majority, it engaged in a substantive analysis. It stated that *Harmelin*'s "plurality and concurrence disagreed as to the appropriate legal principles and modes of constitutional interpretation, and the Supreme Court later rejected the plurality's approach in subsequent cases, including *Atkins*." *Id*. But, as discussed above, that is not entirely correct.

The panel opinion was correct in that *Harmelin*'s *proportionality* discussion was fractured, and that *Atkins* later based its decision on a disproportionality theory. But appellant did not make a disproportionality argument. If he had, he would, like Atkins, have attacked mandatory life-without-parole sentences for intellectually disabled defendants *in all instances*. Instead, he argued his punishment was imposed in a cruel and unusual manner because it denied him a chance to present mitigating evidence. That claim mirrors Harmelin's second argument, which, as demonstrated, was rejected by a majority of the *Harmelin* Court.

But that assertion ignores the Supreme Court's unique role in abrogating its prior rulings. As outlined below, until the Supreme Court itself specifically speaks on this issue as it relates to intellectually disabled offenders, all courts below it are bound to apply *Harmelin*'s general holding.

3. Lower courts are bound by Supreme Court holdings until it says otherwise

The Supreme Court has repeatedly instructed lower courts to follow its precedents *even if* those precedents seem to have been implicitly abrogated or overruled by later doctrinal or factual developments. Specifically, it has stated, "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Exp.*, Inc., 490 U.S. 477, 484 (1989). As Justice Stevens noted in dissent, by refusing to follow controlling precedent that was seemingly abrogated by later cases, the lower court engaged in "an indefensible brand of judicial activism." *Id*. at 486 (Stevens, J., dissenting) (disagreeing with the Court's holding, but agreeing that the lower court overstepped its bounds); *see also Knick v. Township of Scott*, 139 S. Ct. 2162, 2177-78 (2019) ("[O]nly this Court or a constitutional amendment can alter our holdings."); *Eberhart v. United States*, 546 U.S. 12, 19-20 (2005) (expressing gratitude towards the lower court for adhering to the Court's precedent even

though that precedent seemed to have been undermined by later interpretive developments); *Hohn v. United States*, 524 U.S. 236, 252-53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."); *Agostini v. Felton*, 521 U.S. 203, 237-38 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. . . . The trial court . . . was . . . correct to recognize that the motion had to be denied unless and until this Court reinterpreted the binding precedent.").

That instruction has been acknowledged and followed by numerous Texas and federal-circuit courts. *E.g.*, *National Coalition for Men v. Selective Service System*, 969 F.3d 546, 547-48 (5th Cir. 2020) (per curiam); *Price v. City of Chicago*, 915 F.3d 1107, 1111 (7th Cir. 2019) (the argument that more recent Supreme Court opinions have nullified a previous case is "a losing argument in the court of appeals"); *Prison Legal News v. Secretary, Fla. Dep't of Corr.*, 890 F.3d 954, 966 (11th Cir. 2018) ("The only Court that can properly cut back on Supreme Court decisions is the Supreme Court itself."); *Sheffield Development Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 673-74 (Tex. 2004); *Sellers v. State*, 13-18-00572-CR, 2019 WL 2042040, at *3 (Tex. App.—Corpus Christi–Edinburg May 9, 2019, no pet.) (mem. op., not designated for publication); *cf. Ex parte*

Williams, 200 S.W.3d 819, 820-823 (Tex. App.—Beaumont 2006, no pet.) (questioning the continued validity of a general holding of this Court, but applying that holding anyway).

Recent holdings of the United States Court of Appeals for the Fifth and Sixth Circuits are illustrative. In *United States v. Dinh*, 920 F.3d 307 (5th Cir. 2019), the defendant argued that the Confrontation Clause, as enunciated in *Crawford v. Washington*, 541 U.S. 36 (2004), should be extended to the sentencing phase. *Dinh*, 920 F.3d at 311. In rejecting that claim, the Fifth Circuit noted that "it has long been established by the Supreme Court that defendants do not have a constitutional right of confrontation or cross-examination at the sentencing phase." *Id*. at 312 (citing cases). And, because "*Crawford* did not address the rights of a defendant at sentencing, . . . the Supreme Court's precedent in those earlier cases remain[ed] binding . . . ." *Id*. (citing *Agostini*, *supra*). The court concluded that if the Confrontation Clause were to be extended to the sentencing phase, "that decision would have to come from the Supreme Court." *Id*.

Moreover, in *Thompson v. Marietta Educ. Ass'n*, 972 F.3d 809 (6th Cir. 2020), a teacher sued the educational association and board of education for violating her First Amendment rights, claiming that the reasoning of *Minnesota State Bd. for Cmty. Coll. v. Knight*, 465 U.S. 271 (1984), which directly controlled, had been undermined by the Supreme Court's holding in *Janus v. AFSCME*, 138 S.

Ct. 2448 (2018). *Thompson*, 972 F.3d at 812. The Sixth Circuit agreed that, after *Janus*, *Knight* rested on a now-nonexistent doctrinal foundation. *Id*. at 813-14. Nonetheless, it refused to apply *Janus* because to do so would require it to "functionally overrule" *Knight*. *Id*. at 814. And, because "lower courts must follow Supreme Court precedent," "that is something lower court judges have no authority to do." *Id*. at 813-14; *see also id*. at 814 (quoting *Rodriguez de Quijas*, *supra*).

Thus, as demonstrated, even when a case's doctrinal foundations have been completely undermined by later Supreme Court opinions, lower courts are still bound by the Supreme Court's on-point holdings.

4. *Miller* did not license wandering from *Harmelin*'s path

Here, the Supreme Court rule at issue is *Harmelin*'s holding that mandatory life without parole is not cruel and unusual. The Supreme Court has only deviated from that holding in cases involving offenders who committed homicides while juveniles. *Miller v. Alabama*, 567 U.S. 460 (2012). On the other hand, the Supreme Court has never deviated from or abrogated *Harmelin*'s holding in the context of intellectually disabled offenders. It might in the future. But until it does, all other courts must adhere to *Harmelin*'s general rule even in the face of subsequent doctrinal developments that theoretically undermined it.

What, then, to make of *Miller*'s declaration that "*Harmelin* had nothing to do with children," on which the court of appeals relied? *Miller*, 567 U.S. at 481. In other words, why would *Miller* turn on the age distinction between Ronald Harmelin and Evan Miller? The *Miller* Court itself answered that by stating, "[I]f (as *Harmelin* recognized) 'death is different,' children are different too." *Id*. As will be discussed more below, *Miller*'s entire reasoning rested on the fundamental differences between children and adults, leaving *Harmelin* otherwise intact. *See id*. at 482 ("Our ruling thus neither overrules nor undermines nor conflicts with *Harmelin*.").

Moreover, the court of appeals ignored that it was the Supreme Court *itself* that made that declaration. It alone has the prerogative to decide whether its holdings apply in a given situation after a general rule like *Harmelin*'s has been handed down. In *Miller*, it decided that *Harmelin* did not apply because of what it considered to be a material distinction between the two offenders. It did not concern itself with the differences between intellectually disabled persons and other adults because those were not the facts before it. Thus, one cannot assume that it will see adults with intellectual disabilities as fundamentally different from other adults in the context of mandatory life without parole. Accordingly, the court of appeals acted outside its prerogative by deciding that *Harmelin* did not apply because of what *it* considered to be a material distinction between Harmelin and

appellant. In our hierarchical court system, that was not a road open to the court of appeals. *See Price*, 915 F.3d at 1119 ("The road the plaintiffs urge is not open to us in our hierarchical system.").

An analogy helps illustrate the point. Some neuroscience research has suggested that humans, especially males, may not reach full maturity until around the age of 25. If a 19-year-old offender argued that, in light of such science, *Miller* entitled him to a discretionary hearing before being subject to life without parole, lower courts would be forced to reject that claim. That is so because, despite many similarities between young adults and juveniles, lower courts would still be bound by *Harmelin*'s holding. *See United States v. Chavez*, 894 F.3d 593, 608-09 (4th Cir. 2018) (citing *Harmelin* and rejecting attempts to extend *Miller* to young adults facing mandatory life sentences). In other words, a lower court could not skirt around *Harmelin* by saying, "*Harmelin* does not control because it 'had nothing to do with [young adults].'" That is not how precedent works. *See Prison Legal News*, 890 F.3d at 967 ("We follow Supreme Court decisions, here as elsewhere, instead of plotting ways around them.").

The same would be true of a host of different types of defendants who may share characteristics with juveniles, notably offenders with certain mental or emotional disabilities. For example, in *Modarresi v. State*, it was undisputed that Modarresi suffered from post-partum depression associated with Bipolar Disorder.

488 S.W.3d 455, 459, 466 (Tex. App.—Houston [14th Dist.] Houston 2016, no pet.). Obviously, Ronald Harmelin, a man, could not suffer from post-partum depression. But despite that material difference between Harmelin and Modarresi, the *Modarresi* Court recognized that it was bound by *Harmelin*. *Id.* at 466-67. And it did so while acknowledging *Miller*. *Id*. at 466 n.6. Simply, despite the seeming appropriateness of deviating from a holding in a particular case, abrogation of general Supreme Court holdings, including *Harmelin*'s, rests with the Supreme Court, not the lower courts.

5. *Atkins* did not alter *Harmelin*

Nor does *Atkins*, which categorically barred the death penalty for intellectually disabled defendants, change the analysis because it was not concerned with the mandatory imposition of a particular punishment, but rather, the imposition of that punishment in all instances. Thus, it developed along a different doctrinal theory—disproportionality—not at issue here or in *Hamelin*'s majority opinion. *See supra* note 4.

Moreover, *Atkins* was a landmark holding. We have no idea what discussions went on among the Justices when they were cobbling together a coalition to reach such an extraordinary result. It may well be that a key number of Justices were only willing to join the opinion because they knew mandatory life without parole remained a viable alternative for intellectually disabled offenders.

In other words, if *Atkins* compromised *Harmelin*'s general holding, then there may not have been enough votes to form a majority. Thus, the groundbreaking nature of *Atkins* perfectly illustrates why the Supreme Court forbids lower courts from deviating from its holdings. If the Court cannot trust the lower courts to hew to its opinions, then it may not be willing to hand down groundbreaking legal rules.

If *Harmelin* had never been decided, then this situation would be different. Absent an underlying rule regarding the mandatory imposition of life without parole, lower courts could potentially extend *Miller* and related holdings to new circumstances the Supreme Court had not yet addressed. But *Harmelin* does exist, and, as a result, only the Supreme Court may depart from it. That is to say, no lower court may extrapolate what the Supreme Court may do with *Harmelin*'s rule in the context of intellectually disabled offenders. Instead, "that decision would have to come from the Supreme Court." *United States v. Dinh*, 920 F.3d 307, 312 (5th Cir. 2019).

Therefore, the court of appeals erred when it refused to follow binding Supreme Court precedent and, accordingly, must be reversed.

d. Intellectually disabled offenders are not sufficiently analogous to juveniles to warrant individualized sentencing hearings

The court of appeals based its decision on an analogy between juveniles and intellectually disabled offenders, noting that "[m]embers of each class of defendants have diminished culpability compared to other offenders." *Avalos v. State*, 616 S.W.3d 207, 210 (Tex. App.—San Antonio, pet. granted) (op. on en banc reconsideration). While acknowledging that "differences exist" between those classes of offenders, *id*., as the dissent noted, the majority did "not identify those differences or explain why most of these differences are immaterial." *Id*. at 212 (Chapa, J., dissenting). As outlined below, the analogy ignores fundamental differences between juveniles and adults, including intellectually disabled adults.

1. Youthful immaturity is transient; intellectual disability is not

Miller outlined several material distinctions between juveniles and adults. The obvious difference between juveniles and adults—including intellectually disabled adults—is that juveniles are less mentally and emotionally developed because they are still maturing. Thus, the character of juvenile offenders is less well formed and their traits less fixed than those of adult offenders. *Miller v. Alabama*, 567 U.S. 460, 471 (2012). Moreover, recklessness, impulsivity, and risk taking are more likely to be *transient* in juveniles than in adults. *Id*. at 471-72. Simply, not only do juveniles have diminished culpability, they also have "greater prospects for reform" than adult offenders. *Id*. By focusing on diminished

culpability alone, the court of appeals completely missed "*Miller*'s central intuition—that children who commit even heinous crimes are capable of change." *Montgomery v. Louisiana*, 577 U.S. 190, 212 (2016).

Unfortunately, the same is not true for intellectually disabled adults. Unlike juveniles, appellant and those like him will never change; they will always be intellectually disabled. *See Heller v. Doe*, 509 U.S. 312, 323 (1993) (noting that intellectual disability "is a permanent, relatively static condition"); *Bourgeois v. Watson*, 977 F.3d 620, 637 (7th Cir. 2020) ("Intellectual disability is a permanent condition . . . ."). As noted by the Supreme Court of Illinois:

> While the Supreme Court's decision in *Miller* is based in part upon the lesser culpability of youth—a characteristic the *Atkins* Court pronounced [is] shared by the intellectually disabled—the *Miller* Court's decision is founded, principally, upon the *transient* characteristics of youth, characteristics not shared by adults who are intellectually disabled.

People v. Coty, ___ N.E.3d ___, 2020 WL 2963311, at *10 ¶ 39 (Ill. June 4, 2020).

Furthermore, in *Montgomery v. Louisiana*, the Supreme Court explained that a *Miller* hearing is required to separate "children whose crimes reflect transient immaturity" from "those rare children whose crimes reflect irreparable corruption." 577 U.S. at 209. Life without parole is prohibited for the former but not the latter. *Id.* at 208-09. In other words, juveniles with a fixed trait—irreparable corruption—can receive life without parole, but a hearing must first be

held to ensure that they fall into that category.[5] But since intellectual disability is always a fixed trait—i.e., there is no such thing as a transient intellectual disability—there is no need to hold a hearing to separate one category of intellectually disabled offender from another.

As the dissent below noted, "If juveniles are entitled to individualized sentencing because the developmental features of youth are transient, . . . then it is unclear how the majority's holding flows straightforwardly from *Miller* when impaired cognitive functioning is an 'intellectual disability' only if the condition is permanent." *Avalos*, 616 S.W.3d at 212 (Chapa, J., dissenting).[6]

Certainly, diminished culpability is a trait shared by juveniles and the intellectually disabled. In *Atkins*, the Supreme Court listed a variety of factors that lessen the culpability of intellectually disabled offenders, *see Coty*, 2020 WL 2963311, at *8 ¶ 33 (listing *Atkins* factors), and those factors largely mirror the Supreme Court's rationale in finding juveniles less culpable. But culpability is not the only consideration when determining appropriate and effective sentences. By

[5] However, a separate finding of irreparable corruption (or, "permanent incorrigibility") is not required. *Jones v. Mississippi*, 593 U.S. ___, No. 18-1259, 2021 WL 1566605 (April 22, 2021).

[6] Indeed, even having a transient trait does not necessarily spare an offender from receiving mandatory life without parole. In *Modarresi*, the defendant suffered from post-partum depression associated with Bipolar Disorder. *Modarresi v. State*, 488 S.W.3d 455, 465-67 (Tex. App.—Houston [14th Dist.] Houston 2016, no pet.). That is to say, her condition was not a fixed trait. Like juveniles, her mental state could change through treatment or just the normal passage of time. Despite that, *Miller* was unavailing because, even though her condition was transient, her situation was not sufficiently analogous to that of juveniles.

not recognizing transient immaturity as the key feature distinguishing juveniles from adults, the court of appeals missed the correlation between fixed traits and the rationales underlying mandatory life without parole.

For example, although *Atkins* abrogated *Penry v. Lynaugh*, 492 U.S. 302 (1989), it did not dispute *Penry*'s observation that a defendant's intellectual disability may be a "two-edged sword" in that, while it may diminish his blameworthiness, it also indicates that there is a probability he will be a future danger. *Coty*, 2020 WL 2963311, at *9 ¶ 34. Thus, "some of the very factors that the Court in *Atkins* found *reduced culpability* . . . are what make [such offenders] *a continuing danger to reoffend*." *Id*. at *9 ¶ 36. In other words, being less culpable than other adults does not mean intellectually disabled offenders do not pose a danger to society for the rest of their lives. Accordingly, a legislature acts within its purview by incapacitating them indefinitely.

On that point, the *Atkins* Court concluded that retribution and deterrence did not justify imposing the death penalty on intellectually disabled offenders, but it conspicuously declined to address incapacitation. *See Atkins*, 536 U.S. at 350 (Scalia, J., dissenting) ("The Court conveniently ignores a third 'social purpose' of the death penalty—'incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future[.]'"). Life without parole serves that purpose by preventing intellectually disabled offenders

who have proven themselves to be especially dangerous from hurting anyone else, while at the same time sparing them the death penalty. Since the *Atkins* majority did not address incapacitation, it necessarily did not discount it as justifying life without parole for intellectually disabled offenders.

Moreover, intellectual disability lessens the capacity for rehabilitation. Thus, the *Atkins* factors referenced above "logically impair rehabilitative potential . . . ." *Coty*, 2020 WL 2963311, at *9 ¶ 37. And, "unlike a juvenile, whose mental development and maturation will eventually increase [rehabilitative] potential, the same cannot generally be said of the intellectually disabled over time." *Id*.

Accordingly, when a legislature is crafting generally applicable punishments for heinous crimes, it may assume that adults as a class will never change and, thus, must be sentenced to life without parole. As demonstrated, there is nothing about having an intellectual disability that undercuts such an assumption; while intellectually disabled adults are less culpable, the permanency of their condition coupled with their age makes them less likely to be rehabilitated and more likely to reoffend. And the entire point of mandatory life without parole is to prevent incorrigible, dangerous offenders—like appellant—from reoffending.

2. Youth in and of itself separates juveniles from adults

The court of appeals ignored another material difference between juveniles and adults, namely, juveniles are simply younger. Thus, a sentence of life without parole is an especially harsh punishment for juveniles, because they will inevitably serve more years and a greater percentage of their lives in prison than adult offenders. *Miller*, 567 U.S. at 475. Moreover, for juveniles, life without parole is akin to a death sentence because of their age. *Id*.

However, categorically speaking, neither of those reasons apply to adults, intellectually disabled or otherwise, because they could be of any age 18 or older. And, as the *Harmelin* majority made clear, when it comes to adults, there is a clear distinction between the death penalty and life without parole. *Harmelin v. Michigan*, 501 U.S. 957, 995-96 (1991).

Therefore, "by melding *Miller* and *Atkins* together to fashion some sort of alloyed caselaw that would shield" the intellectually disabled from life without parole, the court of appeals engaged in impermissible "Eighth-Amendment alchemy" because those cases "had separate penological underpinnings," "were motivated by different justifications," and thus "are incompatible for any sort of constitutional hybridization." *United States v. Davis*, 531 F. App'x 601, 608 (6th Cir. 2013). Accordingly, the lower court's analogy between juveniles and the intellectually disabled cannot withstand scrutiny, requiring reversal.

e. Appellant and the court of appeals failed to demonstrate a national consensus against life without parole for intellectually disabled offenders

The Supreme Court has said that the Eighth Amendment draws "its meaning from the evolving standards of decency that mark the progress of a maturing society." *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002). The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures. *Id*. at 312. Appellant, however, never outlined which states, if any, have prohibited mandatory life without parole for intellectually disabled offenders. Since he bore the burden of establishing the statute's unconstitutionality, his failure to do so greatly—if not completely—undermines his claim.

The court of appeals also failed to review any legislative enactments from around the country, claiming that, since its "ruling follow[ed] from precedent and [did] not categorically bar any penalty," such an analysis was unwarranted. *Avalos*, 616 S.W.3d at 211 n.4. But, as demonstrated above, its opinion did not follow from precedent. Instead, it meshed together two incompatible cases.

Moreover, the court of appeals relied on *Miller* for its conclusion that reviewing legislative trends was unnecessary. *Id*. That is odd because *Miller* itself spent several pages doing exactly that. *Miller*, 567 U.S. at 483-87. Certainly, the *Miller* Court noted that the need to do so was less pronounced there than in other

cases. *Id*. at 483. But that did not mean, as the court of appeals believed, such consideration was wholly irrelevant when handing down a landmark ruling. Otherwise, the *Miller* Court's efforts would have been superfluous. Instead, while legislative enactments are less of a factor here than in some other circumstances, such a review remains a highly relevant endeavor when analyzing the Eighth Amendment. *Cf. Jones v. Mississippi*, 593 U.S. ___, No. 18-1259, 2021 WL 1566605, at *10 (April 22, 2021) ("[A]n on-the-record sentencing explanation with an implicit finding of permanent incorrigibility is not dictated by any historical or contemporary sentencing practice in the States.").

Moreover, no caselaw indicates a changing national consensus towards prohibiting mandatory life without parole for the intellectually disabled. Notably, the only case appellant relied upon below for his contention that the combined reasoning of *Atkins* and *Miller* forbid such sentences was reversed by the Supreme Court of Illinois. *People v. Coty*, 110 N.E.3d 1105 (Ill. App. Ct. 2018), *rev'd*, 2020 WL 2963311, at *11 ¶ 45.

The court of appeals likewise failed to cite to any case that comports with its holding. In fact, as the dissent noted, the court of appeals's holding brings "Texas out of step with the growing consensus of other jurisdictions . . . ." *Avalos*, 616 S.W.3d at 213 & n.3 (Chapa, J., dissenting) (citing cases). For example, the Massachusetts Supreme Judicial Court addressed this issue in the context of

defendants with "developmental disabilities." *Commonwealth v. Jones*, 90 N.E.3d 1238, 1249-52 (Mass. 2018). After considering arguments very similar to the ones appellant made below, it ultimately declined to extend *Miller*'s holding to such defendants. *Id.*[7]

A variety of other courts have likewise declined to hammer the round peg of *Atkins* into the square hole of *Miller*. *E.g.*, *Parsons v. State*, No. 12-16-00330-CR, 2018 WL 3627527, at *4-5 (Tex. App.—Tyler July 31, 2018, pet. ref'd) (mem. op., not designated for publication); *State v. Little*, 200 So.3d 400, 403-04 (La. Ct. App. 2016) (rejecting downward departure from a mandatory sentence of life without parole for a defendant with a developmental disability); *Baxter v. Mississippi*, 177 So.3d 423, 447 ¶ 83 (Miss. Ct. App. 2014) (stating that the defendant's "intellectual disability only precluded the death penalty, not life imprisonment without parole"), *aff'd*, 177 So.3d 394 (Miss. 2015); *Turner v. Coleman*, No. 13-1787, 2016 WL 3999837, at *8-9 (W.D. Pa. July 26, 2016); *cf. State v. Moen*, 422 P.3d 930, 935-38 (Wash. Ct. App. 2018) (in a facial challenge, holding mandatory life without parole for a defendant with dementia did not violate state-constitutional analogue to the Eighth Amendment, and declining to address an Eighth Amendment challenge because state analogue provided greater protections).

[7] Massachusetts law distinguishes between "developmental disabilities" and "intellectual disabilities." Mass. Gen. Laws Ann. ch. 123B, § 1. But, considering how those terms are defined, it is hard to see how a prohibition on mandatory life without parole would apply to an intellectually disabled offender but not a developmentally disabled one.

As the Illinois Supreme Court stated,

> To the extent that the eighth amendment requires consideration . . . of the "moral judgment" and "mores" of a wider, *national* community, we note that . . . courts across the country that have addressed the issue have declined to extend *Atkins* to noncapital sentences or *Miller* to the intellectually disabled. We take this to mean that the "moral judgment" and "mores" of the nation are not inconsistent with our own in this matter.

Coty, 2020 WL 2963311, at *11 ¶ 45 (ellipses added; some internal punctuation marks omitted).

As there is no national consensus about, or trend towards, prohibiting mandatory life without parole for the intellectually disabled, this Court should decline the invitation to make Texas a glaring outlier.

f. Other considerations warrant reversal

The dissenting opinion below also outlined several other negative implications that could potentially flow from the court of appeal's holding. *Avalos*, 616 S.W.3d at 212-13 (Chapa, J., dissenting). Notable among them, "unearthing numerous capital murder cases for new punishment hearings" following habeas relief, which could have considerable "implications for the families of capital murder victims—families who once had some closure through prior legal proceedings . . . ." *Id*. at 212. Moreover, the holding below would also necessarily "extend to automatic life sentences without parole for repeat violent sexual offenders who are intellectually disabled." *Id*. at 212-13 (citing Tex. Penal

Code Ann. § 12.42(c)(4)); *see also* Tex. Penal Code Ann. § 12.42(c)(3) (certain repeat sexual offenders "shall be punished for a capital felony"). Such far-reaching consequences should not be allowed to stand on the tenuous perch erected by the court of appeals.

g. Alternative reprieves remain available

Finally, it is important to remember that intellectually disabled defendants are not without recourse for reprieve if society ever sours on the idea of imprisoning them indefinitely "since there remain the possibilities of retroactive legislative reduction and executive clemency." *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991); *see also Jones v. Mississippi*, 593 U.S. ___, No. 18-1259, 2021 WL 1566605, at *12 (April 22, 2021) (noting that states may offer greater protections than the Constitutional requires, and discussing various alternative reprieves that remain available to those who receive life without parole). And such alternative reprieves are not just theoretical possibilities.

For instance, the Legislature has prohibited life without parole for juveniles who commit capital murder. Tex. Penal Code Ann. § 12.31(a)(1). So, while the Legislature has seen fit to extend greater protections to juveniles than the constitution requires, *Lewis v. State*, 428 S.W.3d 860, 863 (Tex. Crim. App. 2014) (noting that "[j]uveniles are still constitutionally eligible for life without parole"), it has not done so for intellectually disabled adults. It might in the future because,

as the Supreme Court has observed, the intellectually disabled are not "politically powerless." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445 (1985). But it is not required to do so.

Moreover, in his *Harmelin* concurrence, Justice Kennedy noted that prosecutors may, in their discretion, bring lesser charges to avert unjust sentences. *Harmelin*, 501 U.S. at 1008 (Kennedy, J., concurring). For example, in a multiple-victim murder case like this one, prosecutors could choose to charge the crimes under § 19.03(a)(7) of the Penal Code. In that situation, life without parole would be mandatory for an intellectually disabled adult offender. But if prosecutors believed that such a punishment was, under the circumstances, unnecessarily harsh, then they could, in their discretion, charge each murder individually, resulting in a punishment hearing and range of sentencing options.

Therefore, as other options remain available, an inflexible constitutional rule is unwarranted.

* * *

The day may come when, like juveniles, the intellectually disabled are exempted from mandatory life-without-parole sentences. But, until the Legislature or the Supreme Court decide otherwise, this Court should chart a narrow course, guided by the courts that have navigated a more cautious approach. Accordingly, the court of appeals should be reversed.

II. Alternatively, the only available sentencing options should be life with parole eligibility or life without parole.

If this Court affirms, it should take this opportunity to answer a question not addressed by the holding below, namely, following an individualized sentencing hearing, what is the allowable range of punishment? Rather than waiting until after appellant is resentenced, answering that question now will serve the interests of judicial economy by providing the trial court with guidance and preventing the need for further litigation by the parties. *Cf. Ex parte Reed*, ___ S.W.3d ___, No. WR-50,961-10, 2019 WL 6108568, at *2 (Tex. Crim. App. 2019) (Keasler, J., concurring) ("If nothing else, judicial economy counsels our resolving this issue before needless and time-consuming additional litigation is generated.").

If, as the court of appeals stated, its holding flows from *Miller*, then it is notable that the Supreme Court has endorsed a narrow construction of *Miller*, stating, "Giving *Miller* retroactive effect . . . does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole." *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016). Instead, a "State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them." *Id*. It continued, "Those prisoners who have shown an inability to reform will continue to serve life sentences." *Id*.

Indeed, even before *Montgomery* was decided, this Court declared that *Miller* pronounced a new substantive rule and therefore applied retroactively. *Ex parte Maxwell*, 424 S.W.3d 66 (Tex. Crim. App. 2014). In *Maxwell*, the applicant had committed capital murder when he was 17 years old. *Id*. at 68. Under the then-applicable sentencing scheme, he was sentenced to automatic life without parole. *Id*. at 68 & n.3. After finding that *Miller* was retroactive, this Court granted habeas relief, vacated his sentence, and remanded for a new hearing where the available sentences were either life with the possibility of parole or life without parole. *Id*. at 76.[8]

Thus, if this Court holds that there was error akin to a *Miller* violation, then the remedy provided for in *Maxwell* should apply here as well. In other words, after a punishment hearing, the trial court should be limited to choosing between life with parole eligibility or life without parole.

[8] Other courts that have been confronted with the ramifications of *Miller* have held likewise. *E.g., Williams v. People*, 64 V.I. 618, 625-26 (V.I. 2016); *State v. Louisell*, 865 N.W.2d 590, 598-601 (Iowa 2015); *People v. Tate*, 352 P.3d 959, 970 (Colo. 2015); *Ex parte Henderson*, 144 So. 3d 1262, 1281-83 (Ala. 2013); *Commonwealth v. Batts*, 66 A.3d 286, 293-97 (Pa. 2013).

PRAYER

Counsel for the State prays that this Honorable Court REVERSE the court of appeals, and AFFIRM the judgment of the trial court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Andrew N. Warthen, hereby certify that the total number of words in this brief is 6,766. I also certify that a true and correct copy of this brief was emailed to appellant Johnny Joe Avalos's attorney, Jorge G. Aristotelidis, at jgaristo67@gmail.com, and Stacey Soule, State Prosecuting Attorney, at information@spa.texas.gov, on this the 27th day of April, 2021.

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